United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

ORIGINAL

74-2326

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of	In Proceedings for an Arrangement
D. H. OVERMYER CO., INC. (Alabama)	No. 73 B 1126
D. H. OVERMYER CO., INC. (Arizona)	No. 73 B 1127
D. H. OVERMYER CO., INC. OF OHIO	No. 73 B 1128
D. H. OVERMYER CO., INC. (Ohio)	No. 73 B 1129
D. H. OVERMYER CO., INC. (California)	No. 73 B 1130
D. H. OVERMYER CO., INC. (Colorado)	No. 73 B 1131
D. H. OVERMYER CO., INC. (Connecticut)	No. 73 B 1132
D. H. OVERMYER CO., INC. (Delaware)	No. 73 B 1133
D. H. OVERMYER CO., INC. (Florida)	No. 73 B 1134
D. H. OVERMYER CO., INC. (Georgia)	No. 73 B 1135
D. H. OVERMYER CO., INC. (Illinois)	No. 73 B 1136
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D. H. OVERMYER CO., INC. (Missouri)	No. 73 B 1146
D. H. OVERMYER CO., INC. (Nebraska)	No. 73 B 1147
D. H. OVERMYER CO., INC. (Nevada)	No. 73 B 1148
D. H. OVERMYER CO., INC. (New Jersey)	No. 73 B 1149
D. H. OVERMYER CO., INC. (New Mexico)	No. 73 B 1150
D. H. OVERMYER CO., INC. (New York)	No. 73 B 1151
D. H. OVERMYER CO., INC. (North Carolina)	No. 73 B 1152
D. H. OVERMYER CO., INC. (Oklahoma)	No. 73 B 1153
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D. H. OVERMYER CO., INC. (Tennessee)	No. 73 B 1157
D. H. OVERMYER CO., INC. (Texas)	No. 73 B 1158
D. H. OVERMYER CO., INC. (Utah)	No. 73 B 1159
D. H. OVERMYER CO., INC. (Virginia)	No. 73 B 1160

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D. H. OVERMYER CO., INC. (Washington)	No. 73 B 1161
D. H. OVERMYER CO., INC. (Wisconsin)	No. 73 B 1162
DHORE COMPANY, INC.	No. 73 B 1189
OVERMODAL TERMINALS, INC.	No. 73 B 1175

Debtors-Appellants,

-and-

ROBERT P. HERZOG,

Receiver-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

APPELLANTS' APPENDIX VOLUME 2

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INTRODUCTORY AMENDMENT

Point III of the following brief addresses itself to proceedings relating to six warehouses, one of which, Miami 3, was included in error and was withdrawn from this Point on the record in the District Court, and another of which is not being appealed to the Second Circuit. Accordingly, Point III should be read only with respect to four warehouses, Denver 4, St. Louis 2 and 3, Richmond 1 and Columbus 3.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of	In Proceedings for an Arrangement
D. H. OVERMYER CO., INC. (Alabama)	No. 73 B 1126
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DHORE COMPANY, INC.	No. 73 B 1189
OVERMODAL TERMINALS, INC.	No. 73 B 1175

Debtors.

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BRIEF OF RECEIVER-APPELLANT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter

of

D. H. OVERMYER CO., INC., et al.,

Debtors.

Index Nos. 73 B 1126-62,
73 B 1175 and
73 B 1189

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BRIEF OF RECEIVER-APPELLANT

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BRIEF OF RECEIVER-APPELLANT

Issues Presented

1. Whether the Bankruptcy Judge erred in:

a. Refusing to exercise his equitable power to prevent the forfeiture of valuable long-term leases owned by the debtors and instead, allowing termination of the leases under the boilerplate bankruptcy default provisions contained therein when:

i. Such leases constitute the very stock-in-trade of the debtors, are essential to the continued operation of the business of the debtors and are necessary for their rehabilitation; and

ii. Allowing forfeiture confers an unjust windfall upon the landlords at the direct expense of all other unsecured creditors, and the debtors.

b. Encompassing within his Opinion several litigated adversary proceedings where the bankruptcy default provisions were not at issue, but nevertheless finding against the debtors in such proceedings on the basis of the bankruptcy default provisions.

c. Failing to make appropriate findings of fact and conclusions of law as required by the Federal Rules of Civil Procedure in those litigated adversary proceedings where the bankruptcy default clauses were at issue.

Preliminary Statement

The reason for this appeal is the opinion dated July 23, 1974 (the "Opinion") of Hon. Roy Babitt (the "Bankruptcy Judge") and the orders entered thereon on August 6, 1974. In immediate terms, the Opinion of the Bankruptcy Judge will precipitate the adjudication in bankruptcy of virtually all of the separate and distinct corporate debtors involved in these proceedings (collectively the "Debtors"*). In terms of legal significance, the Opinion impedes the application in this Circuit of a progressive development in bankruptcy jurisprudence freshly approved by the Court of Appeals for the Second Circuit. (Queens Boulevard Wine & Liquor Corp. v. Blum et al. _____ Fed.2d ____ (June 11, 1974, Docket Number 73-1512, Slip Sheet opinion at 4113).

The Debtors, who are engaged in the primary business of short-term leasing of warehouse space to others, will be adjudicated bankrupts because the Bankruptcy Judge, vested with the equitable power to prevent the Debtors landlords (the "Landlords" or "Appellees") from enforcing the boilerplate bankruptcy default provision in the long-term leases of

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* The Bankruptcy Judge captioned his Opinion with the names of D. H. Overmyer Co., Inc. (Ohio) and 36 of its subsidiary corporations bearing the name "D. H. Overmyer Co., Inc." with the state of incorporation and two other affiliated Debtor companies. However, all of the Debtors were not involved in these contested adversary proceedings and at the present time, only some 16 of the Debtors are parties to this appeal.

their large warehouse structures to the Debtors , declined to do so. These valuable long-term leases are assets of the Debtors, essential to their continued viability as a business enterprise. If the orders of the Bankruptcy Judge are permitted to stand in these particular Chapter XI proceedings, there can be no rehabilitation of the Debtors because termination of these leases is nothing less than the liquidation of their very stock-in-trade. Moreover, the Landlords will, in effect, appropriate these profitable leaseholds without paying any consideration for them, thereby obtaining an unjust windfall that can be measured only by its devastating effect on the other unsecured creditors and the Debtors themselves.

In terms of bankruptcy jurisprudence, the decision by the Bankruptcy Judge is, at the very least, regressive. It condones what courts of equity typically condemn, forfeiture; it bestows on one class of unsecured creditors an unjustifiable windfall, and discriminates against the remaining unsecured creditors by substantially diminishing the assets necessary to make them whole; it frustrates any attempt by the Debtors, whose economic health substantially improved under the management of Robert P. Herzog, the Court appointed receiver (the "Receiver"), to rehabilitate themselves and thus devitalizes the salutary effects of Chapter XI of the Bankruptcy Act.

The decision, then, must be reversed. The following statement of facts, summary of these proceedings, description of the issues and points of law will, it is respectfully submitted, show this Court why.

STATEMENT OF FACTS

History of the Debtors

The main business of the Debtors, as now operated by the Receiver, is the long-term leasing of warehouse space from the Landlords and the short-term subleasing of such space to others at rentals which exceed those payable by the Debtors to its Landlords. The long-term leases* at bar, generating profits essential to the continued existence of the Debtors, are nothing less than their stock-in-trade.

In the past, the Debtors usually would purchase a parcel of land, arrange for temporary and permanent financing, construct a warehouse, lease space to others, and in some instances, operate a public warehousing business in a portion of the warehouse. The Debtors typically would sell the improved real estate and occupied warehouses to a landlord-investor, simultaneously lease it back and continue to operate the warehouse in the same manner. In some instances, the Debtors would also obtain an option to re-purchase the improved realty in the future.

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* A typical lease has an unexpired term of approximately 30 years, including renewal periods, which equals the life expectancy of the warehouse.

The Investment by the Landlords

At the time a typical landlord entered the picture, the "package" was thus complete. For investment dollars, the landlord received a fixed return, usually ten percent, over an average period of at least 30 years (including renewal options) and substantial tax shelter. The leases generally provided for a reduced rental from the Debtors to the Landlords during the option periods. The Bankruptcy Judge found that such reduction would increase the yield to the Debtors over the present profits being generated under the leases at issue (Opinion at page 8 of typewritten copy; hereinafter "Opinion at ____").

The term of the subleases to occupants of the warehouses, on the other hand, was generally short. Increases could be, and usually were, negotiated periodically under current market conditions as these subleases matured.

Thus, the Landlords bargained for and were content to receive a fixed rental or return on investment over a long period of time. Their passivity contrasts sharply with the activity of the Debtors, operating their warehouses in the various locations. This comparison will become relevant in weighing the equities involved in this appeal.

Summary of Prior Proceedings

A separate debtor corporation was organized in each state where it leased and operated such warehouses. Some of the Debtors owned more than a single lease and several warehouses,

not involved in this appeal are owned in fee by several of the Debtors. In all, 36 Debtor state corporations were organized and in operation at the time of the commencement of these proceedings. The state Debtors are wholly owned subsidiaries of D. H. Overmyer Co., Inc. (Ohio), the Debtor-parent company.

On November 16, 1973 the state Debtors and their parent corporation filed petitions for arrangement under Chapter XI of the Bankruptcy Act. Two additional corporations - Overmodal Terminals, Inc. and Dhore Company, Inc. - filed similar petitions on November 23, and 26, 1973, respectively, thereby increasing the number of Debtors to 39.

On November 29, 1973, the Bankruptcy Judge adjudicated the parent Debtor and each of the state Debtors a bankrupt and appointed Robert P. Herzog as trustee in bankruptcy to liquidate their respective assets. On December 5, 1973, the adjudication in bankruptcy and the appointment of the trustee were vacated, and Mr. Herzog was appointed Receiver, with authority to continue the operation of the business of the Debtors.

From the date of the filing of the arrangement petitions on November 16, 1973 to the present, virtually all of the landlords, including the Appellees, pressed for judicial termination of their long-term leases. Most of these adversary proceedings were based upon the occurrence of

an event of default under the bankruptcy default provisions of the long-term leases, i.e., the filing of the petitions for an arrangement. Rent defaults in the pre-petition period were also alleged in many, but not all of these proceedings, as a separate default. Several of the Landlords sought relief solely upon the occurrence of alleged events of default in the pre-petition period and did not ask for termination under the bankruptcy default lease provisions. (As will be shown in Point III, infra, the applications of Landlords who failed to allege the bankruptcy default are not properly encompassed with the Opinion.)

At the time of the filing of the arrangement petitions the 36 state Debtors and the two affiliated Debtors owned approximately 200 leases. Marginal and unprofitable leases were subsequently disaffirmed and in some instances the Receiver and Debtors were able to effectuate settlements.

The Receiver and Debtors resisted judicial termination of some 40 remaining leases, and the Bankruptcy Judge prudently ordered separate hearings with respect to each adversary proceeding. Commencing in January 1973 and over a continuous six-month period thereafter, thirty-four separate trials were held on the various Landlords' applications. By the time the Bankruptcy Judge rendered his Opinion in July 1974, the number of contested proceedings submitted for decision had been reduced to twenty-four. To protect his rights, the Receiver filed a Notice of Appeal with respect to all of same on August 7, 1974.

The Receiver has now elected to prosecute his appeal with respect to sixteen of the twenty-four warehouse leases at issue. These sixteen proceedings are set forth on the schedule annexed hereto as Exhibit "A". The warehouses involved in these sixteen proceedings represent substantially all of the remaining profitable warehouses still owned, under lease, by the Debtors. Without such leases, the Debtors, both individually and collectively, can no longer continue as a viable business enterprise.

The Debtors have always identified the various warehouses by city and number (e.g., "Miami No. 2", "Denver No. 1", etc.) and throughout these proceedings all of the parties have continued such designation. In each instance the location of the warehouse determines which of the state Debtors owns the contested long-term lease. Thus, the "Miami No. 2" lease is owned by D. H. Overmyer Co., Inc. (Florida), the "Denver No. 1" lease is owned by D. H. Overmyer Co., Inc. (Colorado), and so forth.

The Two Opinions of the Bankruptcy Judge in these Proceedings

Over a period of some six months of litigation, the Bankruptcy Judge rendered two opinions in these proceedings with respect to termination of leases; the July 23, 1974 Opinion at issue and an oral opinion on June 12, 1974 following the trial of the adversary proceeding commenced by the Landlord of the Tampa No. 3 warehouse (hereinafter the "Tampa Decision").

In his Tampa Decision the Bankruptcy Judge, in exercising his equitable discretion and relying on the Second Circuit decision in Queens Boulevard Wine & Liquor Corp. v. Blum et al., supra, found for the state Debtor, D. H. Overmyer Co., Inc. (Florida) and against the Landlord on the very principles of forfeiture and windfall which the Receiver contends should be controlling in all of the adversary proceedings. The only factual distinction between the Tampa No. 3 proceeding and the cases on appeal is the existence of pre-petition rent defaults in the latter cases. As appears infra, such distinction is not sufficient to support the diametrically opposite results directed by the Bankruptcy Judge, particularly when, as also appears below, the Receiver and Debtors have (i) made it clear that they will and must cure all pre-petition arrears if forfeiture is prevented and (ii) the Landlords have generally indicated that they will refuse to accept payment of arrears while they still believe they have an opportunity to terminate the leases.

The Tampa Decision* is set forth and discussed at Point II, infra, and helps focus on the extent to which the Opinion contains factual errors, inconsistencies and mistakes in law. All of the judicially established criteria for the exercise by the Bankruptcy Judge of his equitable power to

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* The Landlord of Tampa No. 3 has filed a Notice of Appeal and Designation of Record on Appeal, but has not moved to consolidate such appeal with the instant appeals.

prevent the forfeiture of the leaseholds were satisfied in these proceedings. His failure to prevent such forfeiture (except in the Tampa No. 3 proceeding), and his concommitant conferring of a windfall upon the Landlords, as well as other mistakes, perhaps inevitable in a Record so voluminous, give rise to the issues presented by this appeal.

POINT I

NOTWITHSTANDING HIS EQUITABLE POWER TO PREVENT THE FORFEITURE OF THE LONG-TERM LEASES OF THE DEBTORS WITH THEIR LANDLORDS, THE BANKRUPTCY JUDGE ERRONEOUSLY ALLOWED TERMINATION OF THESE LEASES, THEREBY CONDONING A FORFEITURE AND CONFERRING A WINDFALL

A Bankruptcy Judge Has the Equitable Power to Prevent the Forfeiture of Valuable Leaseholds

> "§2. Creation of Courts of Bankruptcy and Their Jurisdiction. a. The courts of the United States hereinbefore defined as courts of bankruptcy and are hereby invested. . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act. . ." 11 U.S.C. §11.

With this language, Bankruptcy Courts became courts with equity jurisdiction under §2a of the Act. See, generally, Young v. Higbee Company, et al., 324 U.S. 204, 214 (1945): Securities and Exchange Commission v. United States Realty & Improvement Co., 310 U.S. 434, 455, 6, 7 (1940); Pepper v.

Litton, 308 U.S. 295, 304 (1939); 1 Collier, Bankruptcy, §2.09 (2d ed. 1971).

> "It has long been established that courts of bankruptcy are essentially courts of equity." United States v. Chase Bank, 331 U.S. 28, 36 (1946).

It is settled that the Bankruptcy Act permits bankruptcy judges to exercise their equitable powers to prevent the termination of leases containing boilerplate bankruptcy default provisions. The Bankruptcy Judge agreed that within the four corners of the Bankruptcy Act there was boundless room for him to exercise his equitable powers to prevent forfeiture. As will be demonstrated below, his refusal to do so is in direct conflict with the recent decision of the Second Circuit in Queens Boulevard Wine & Liquor Corp. v. Blum et al., supra.

Existing Case Law, When Applied to the Facts Established at the Hearings, Should have Compelled the Bankruptcy Judge to Prevent the Forfeiture of the Valuable Leaseholds and the Accompanying Windfall

Section 70b of the Bankruptcy Act, 11 U.S.C. §110b, which, as the Bankruptcy Judge notes "lies at the heart of this case", (Opinion at 18) addresses itself to forfeiture provisions in leases and reads, in pertinent part, as follows:

> ". . . in a lease. . . an express covenant that. . .the bankruptcy of a specified party an election to terminate. . . is enforceable." 11 U.S.C. §110b.

§70b was initially interpreted to mean that bankruptcy default provisions in leases must be enforced. However, from April 1946, when the Supreme Court in Smith v. Hoboken R. R., Warehouse & S. S. Connecting Co., et al., 328 U.S. 123 (1946), refused to allow the forfeiture of a railroad company's lease because of the occurrence of a default under the boilerplate bankruptcy provision, to June 1974, when the Second Circuit refused to allow the forfeiture of a liquor store lease for a small retail premises on Queens Boulevard because of the occurrence of a similar default, the law criticizing and preventing forfeiture under §70b has substantially and liberally developed. Definitive judicial criteria have been established which, if satisfied by the facts of a particular case, should compel the exercise of equitable powers to disallow forfeiture. The facts of these cases satisfy those criteria.

The Criteria

In Smith v. Hoboken R.R., etc., supra, the debtor railroad leased from its lessor for 99 years, a major portion of its right-of-way. The lessor petitioned the court for termination of the lease because the covenant in the bankruptcy clause of the lease forbidding its transfer was breached by the appointment of the trustee. The lower court declared the lease forfeited.

On appeal, the Supreme Court, while noting as dicta that in a Chapter XI proceeding a covenant for forfeiture was

enforceable against a bankruptcy trustee (328 U.S. at 128), held that the overriding public interest in the continued operation of the railroad required a finding by the Interstate Commerce Commission that forfeiture be consistent with a viable plan or reorganization. "Moreover, it appears in the present case that forfeiture of the lease would deprive the debtor of all of its railroad properties. . . If forfeiture of the lease is now declared no plan of reorganization may be possible." (Id. at 131-2).

The Receiver by no means contends that the facts of the Smith case are comparable to those at bar. The decision is cited to show that even in a case where the main criterion relating to the prevention of forfeiture of the leasehold was a strong public interest, there were two other relevant criteria considered by the Supreme Court; (i) whether forfeiture of the lease would deprive the debtor of all of its properties, and (ii) whether forfeiture, if declared, would render formulation of a plan of reorganization impossible. As the case law developed another criterion evolved and the emphasis on public interest softened.

In Fleetwood Motel Corporation, 335 F.2d 857 (3d Cir. 1964) the debtor-tenant entered into a 99-year lease of unimproved property to construct a motel worth approximately $1,400,000.00. The lease contained typical provisions that the failure to pay rent and the occurrence of a bankruptcy were events of default. When built, the motel proved finan-

cially unsuccessful, and the tenant failed to make the necessary rental, real estate tax and mortgage payments. The landlord began to pay the taxes and reduce the mortgage; the tenant filed a petition for reorganization under Chapter X of the Act, and a trustee was appointed.

In affirming the decision of the bankruptcy referee to prevent forfeiture of the lease, the Third Circuit, citing the Smith case, supra, noted the two criteria developed therein:

> "[i]. . . no plan of reorganization could be formulated if forfeiture were permitted for [ii] the property which the landlord would obtain by such action is the only property of the debtor." 335 F.2d at 862.

In observing that there was some public interest in avoiding the forfeiture of the leasehold, the Third Circuit also developed a third and critically important criterion, whether or not forfeiture conferred a windfall:

> ". . . forfeiture of the lease would entitle the landlord to not only the premises but the motel and other improvements and furnishings. . ." 335 F.2d at 861.

A view in perspective of the Smith and Fleetwood cases is in order. In both, the Courts noted the public interest in avoiding a forfeiture of the lease. The public interest in a $500,000.00 securities offering, however, is something less than the public interest in the operation of a railroad. To the extent, then, that the public interest in

a particular case diminishes, the emphasis by the Court on other criteria increases. In the following cases, it is the termination of leases under circumstances unjustifiably beneficial to landlords and grossly unfair to other unsecured creditors and debtor-tenants, that is the common thread. However, a public interest factor common to all reorganizations and arrangements under the Bankruptcy Act is still present, viz., the rehabilitation of the debtor and the protection of all creditors.

In Weaver v. Hutson, 459 F.2d 741 (4th Cir. 1972), cert. den. 409 U.S. 957 (1972), the landlords owned real property for which they once paid approximately three thousand dollars. The tenant, under a ground lease of doubtless long duration, had constructed and operated a motel on the land. The total appraised value of the land and motel was approximately $2,000,000.00. Construction costs exceeded estimates and the tenant obtained additional mortgage financing to which the landlords subordinated their reversion.

After the landlords refused to consent to additional financing, three debenture holders of the tenant filed a creditors' petition under Chapter X of the Bankruptcy Act and a trustee was appointed. The landlords then petitioned the lower court "to declare the lease forfeited because of the alleged breaches, particularly the institution of bankruptcy proceedings under pain of the sanctions of paragraph 12 of the lease. . ."

(459 F.2d at 743). The landlords, in attempting to justify forfeiture, pointed to late rental payments as well as other acts of default.

Insofar as the boilerplate bankruptcy default provision was concerned, the lower court held that ". . . to permit landlords to enforce a forfeiture would be grossly inequitable in view of all of the circumstances. . ." (Id. at 743). These circumstances included the fact that ". . . forfeiture would prove a windfall of about $1,000,000.00 for landlords".(Ibid) (Emphasis added).

The Fourth Circuit then reviewed in precise and articulate language the holdings of the cases previously cited in this memorandum:

> "Notably, both Smith and Fleetwood accent that the result of the forfeiture there sought would be the complete emasculation of the re-organization because the forfeiture would remove the entire res from the estate of the debtor. This would be precisely the effect of a forfeiture in the case at bar. The re-organization would become wholly moot, since the sole property of the Debtor would revert to Landlords." (459 F.2d at 744).

In summarizing the basis of its decision, the Fourth Circuit emphasized the windfall creterion:

> "The answer is that neither the Referee nor the District Court, nor this Court refused forfeiture of the lease because of. . . [waiver]. . . The fundamental bases of decision throughout was that the Landlords' insistence upon a forfeiture was highly unconscionable and inequitable in the circumstances - a demand for blood. The conclusion gen-

> erally was that as a court of equity the bankruptcy court had the discretion and power to refuse enforcement of [the forfeiture provision] and rightfully exercised this perogative. See Fleetwood Motel Corp., 335 F.2d 857, 862 (3 Cir. 1964), cited in the opinion in the instant case. Furthermore, we declined forfeiture in the circumstances as defeating the reorganization aims of Chapter X." (459 F.2d at 745.) (Emphasis added.)

It is important to note that the Fourth Circuit, did not stress the public interest of the debenture holders in avoiding the forfeiture. This is so because courts of equity, with or without such public interest, are philosophically opposed to forfeiture. Smith, Fleetwood and Weaver so hold. If a windfall is coupled with a forfeiture, judicial opposition intensifies. ". . . Insistence upon a forfeiture was highly unconscionable and inequitable in the circumstances -- a demand for blood." Weaver v. Hutson, 459 F.2d at 745. Moreover, in all of these cases, there is public interest in the rehabilitation of the debtor and the protection of all of its creditors.

Thus, when a recent leasehold termination case with a comparatively moderate windfall and no strong public interest found its way to the Second Circuit, it was not surprising to see forfeiture prevented and rehabilitation facilitated. In Queens Boulevard Wine & Liquor Corp. v. Blum et al., _____F.2d ____(2d Cir. June 11, 1974, Docket Number 73-1512, Slip Sheet opinion at 4113), the debtor-tenant

leased a single store where it operated a retail wine and liquor business. The landlord instituted a summary proceeding in Queens County because of the failure of the tenant to pay rent. Shortly thereafter, the tenant filed a Chapter XI petition and the prior action by the landlord was stayed.

Subsequently, the landlord received an offer from a prospective tenant at a higher rent and served a notice of termination of the lease on the debtor. At a hearing before the bankruptcy judge, the offer by the debtor to pay all arrears was rejected by the landlord, who insisted on regaining possession on the grounds that there was no waiver or bad faith. The bankruptcy judge declared the lease terminated but continued the debtor in possession on the basis of the holding In re Lane Foods, Inc., 213 F.Supp 133 (S.D.N.Y. 1963).

Both landlord and tenant filed petitions for review to the United States District Court for the Eastern District of New York, and were awaiting a decision when the creditors tentatively accepted a plan of arrangement providing for installment payments of all obligations. This plan continued the debtor in possession of the leased premises for more than six months after the lease would have expired by its terms.

The District Court addressed itself to the issue of termination, as opposed to continued possession. Citing

the cases briefed in this memorandum, the Court held that it would not lend itself to a forfeiture by allowing the landlord to cancel the lease. The landlord appealed.

No improvement can be made on the articulate review by the Second Circuit of the Fleetwood and Weaver cases, as well as their applicability to the Queens Boulevard Chapter XI proceeding notwithstanding factual differences:

> "We recognize that Fleetwood and Weaver are distinguishable on their facts from the instant case. Queens is not a publicly held corporation. The benefit to the landlord here, in terms of a substantially higher rental income, is different from that in Fleetwood and Weaver where the landlords stood to acquire substantial tenant assets. Despite these and other factual differences, we find the rationale of those cases to be applicable here."
>
> "The purpose of a Chapter XI arrangement, as with a Chapter X reorganization, is to preserve a viable business enterprise where possible and especially when that will be in the 'best interests of . . . creditors'. 11 U.S.C. §766 (1970). See In re Peoples Loan & Investment Co., 410 F.2d 851 (8 Cir. 1969); cf. 9 Collier Bankruptcy Para. 9.17, at 281 (14th ed. 1972). In determining whether to enforce the lease termination here, therefore, we must consider not only the interests of the landlord but also those of the debtor and its creditors. Possession by Queens will not prejudice [the landlord], which is protected by a sizeable security deposit, except to deny it a windfall in the form of increased rent to which we hold it is not equitably entitled. Enforcement of the forfeiture, on the other hand, would destroy a now profitable debtor by depriving it of its most valuable asset -- its location. It also would needlessly injure trade creditors and those outside investors who have furnished capital which has resulted in Queens' rehabilitation. In our view, these individuals stand on no less significant a footing than did the shareholders of the debtors in Weaver and Fleetwood." Queens Boulevard Wine &

Liquor Corp. v. Blum et al., supra at 4121-22.* (Emphasis added).

It now remains to be seen whether the facts at bar, measured against the criteria of (i) forfeiture of valuable assets, (ii) frustration of a plan of arrangement, and (iii) windfall at the expense of other creditors and the debtor, should have compelled the Bankruptcy Judge to do equity.

Forfeiture

There is no serious opposition to the Receiver's contention that the highly profitable long-term leases have substantial value. The value derives from the profit the Debtors earn under each lease, the length of the unexpired term, the fixed and often reduced rent payable to the landlords on renewal, the warehouse replacement cost and other standard indicators.

The Bankruptcy Judge did not dispute these measures of value (Opinion at 12), and characterized the long-term leases involved in this litigation as those ". . . of which the sublease operations of the debtor yield a substantial profit". (Opinion at 14.) A computation of such profit is set forth on Exhibit "A" to this memorandum.

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* All page citations to Queens Boulevard refer to the Slip Sheet Opinion.

Windfall at Expense of Other Creditors and the Debtors

If the Landlords succeed in terminating the leases, there will not be assets in the estate remotely adequate to pay in full the claims of other unsecured creditors. The Landlords, on the other hand, by obtaining title to their warehouses unencumbered by the Debtors' leases will receive more than the value of their claims, because they will not only participate with the other unsecured creditors in whatever assets remain, but also will be enriched by the value of each leasehold. Each Landlord will take over not just a leasehold, but an operating business developed by the Debtors. The windfall effects of forfeiture are obvious and not in dispute. Consequently, the termination of the leases at bar will result in each Landlord receiving more than one hundred cents on the dollar and every other unsecured creditor receiving substantially less.

The Bankruptcy Judge states that the "so-called windfall to these Landlords is part of what they bargained for" (Opinion at 29). He thus finds that a windfall is present. His dismissal of such factor hardly advances the cause of equity jurisprudence and flies in the face of the strenuous efforts of the appellate courts to avoid such inequity.

Impossibility of Formulating a Plan of Arrangement.

As the Court of Appeals noted in Queens Boulevard, "The purpose of a Chapter XI arrangement, as with a Chapter X reorganization, is to preserve a viable business enterprise where possible and especially when that will be in the 'best interest of. . . creditors'". (Queens Boulevard at 4122).

There can be no rehabilitation in these arrangement proceedings if the leases which constitute the primary business, and in most instances, the sole remaining asset of the Debtors, are terminated. Such termination in the factual framework of this case is the equivalent of an adjudication in bankruptcy. Unlike the typical debtor who is able to lease other space in which to operate its business, the loss to the Debtors herein of their leaseholds would constitute a liquidation of their very stock-in-trade.

* * *

In summary, all of the criteria for avoiding forfeiture exist in the case at bar. Even the public interest factor stressed by the Bankruptcy Judge is present, although of a different quality than in a case involving a company with public shareholders.

> "In determining whether to enforce the lease termination here, therefore, we must consider not only the interests of the landlord, but also those of the debtor and its creditors. . . Enforce-

> ment of the forfeiture. . . would needlessly injure trade creditors and those outside investors who have furnished capital which has resulted in Queens' rehabilitation. In our view, these individuals stand on no less significant a footing than did the shareholders of the debtors in Weaver and Fleetwood." (Queens Boulevard at 4122).

In the instant proceedings the general creditors of the Debtors, and a bank which has advanced several hundred thousand dollars to the Receiver to enable operations to continue, also stand on the same footing.

The Erroneous Opinion Below

The Queens Boulevard appeal was argued before the Second Circuit on November 29, 1973 but was not decided until June 11, 1974. The arrangement petitions were filed by the Debtors in November 1973, and the instant adversary proceedings were commenced in November and December of 1973. Throughout the trials, the decision of the Court of Appeals was anxiously awaited as dispositive of the critical issues herein.

The affirmance by the Court of Appeals of the decision of District Judge Judd below advanced the cause of the Receiver and Debtors herein who argued their case on broad equitable principals. Yet, inexplicably and without adequate rationale, the Queens Boulevard decision, instead of being applied in support of the Debtors, has become the in-

strument whereby the Debtors have lost not only the benefit of the equitable principles affirmed in that case, but also whatever support they could have derived from the pre-Queens Boulevard decisions which sought to prevent forfeiture on other, more narrow grounds (e.g., waiver, defective notice, etc.)

The obvious distaste of the Bankruptcy Judge for the rule of law enunciated in Queens Boulevard does not detract from its validity, nor are his attempts to distinguish Queens Boulevard and the cases relied upon therein, persuasive.

The Bankruptcy Judge thus seeks to distinguish the facts of the within cases from those which led to the Smith, Fleetwood and Weaver decisions. He argues that ". . . the judicial tenderness shown the reorganizing debtors in those cases was not based on solicitude for them, but rather an abundance of concern for the public", and that the reason that the Weaver court declined to confer a windfall was the ". . . concern there. . . for the public investors who would be wiped out unless there was a res which the debtor could operate enroute to successfull reorganization." (Opinion at 23-24). The Fourth Circuit itself, however, described its ". . . fundamental bases of decision throughout. . . a[s] the Landlords' insistence upon a forfeiture . . . highly unconscionable and inequitable - a demand for blood." Weaver v. Hutson, 459 F.2d at 745.

The Receiver has shown in this memorandum that the emphasis in those three cases rested in large part on judicial repugnance of forfeiture. More important, the Second Circuit in Queens Boulevard so held:

> "We recognize that Fleetwood and Weaver are distinguishable on their facts from the instant case. Queens is not a publicly held corporation. . . Despite these and other factual differences, we find the rationale of those cases to be applicable here." (Queens Boulevard at 4121-22).

Having failed to properly distinguish Smith, Fleetwood and Weaver, the Bankruptcy Judge compounded his error in attempting to distinguish the facts of Queens Boulevard from those herein. He observed various factual differences between the two cases such as: a) the debtor's arrangement in Queens Boulevard stood on the verge of confirmation; b) a tender of rent arrears was once satisfactory to the landlord and then refused; c) the "bankruptcy clause" in that case prevented forfeiture on certain conditions, and the like (Opinion at 26-27).

The Bankruptcy Judge concludes that based on such facts, "the Court of Appeals found evidence which gave weight to the debtor's argument that the landlord (in Queens Boulevard) might have been estopped from seizing on the 'bankruptcy clause' of the lease" (Opinion at 26). The Court of Appeals, after reviewing the "cumulative effect of these facts [which] lends weight to Queens' estoppel argument" (Queens Boulevard at 4120), concluded that:

> "We do not rest our argument on this [estoppel] ground, however, for we find persuasive those cases relied upon by the district court which hold a lease termination provision to be unenforceable when compelling equitable and policy considerations so require." (Id. at 4120)

The Court of Appeals made it painstakingly clear that "the sole question" before it was whether the bankruptcy court was required to enforce the bankruptcy default clause (Id. at 4114) and that "estoppel" was not an issue.

The Bankruptcy Judge points to the other factual distinctions between Queens Boulevard and the case at bar, observing that the debtor in Queens Boulevard ". . . conducted its business from a single site. . ." (Opinion at 26). The significance of this observation is not readily apparent, because the Debtors here conduct their business from 20 single sites, thereby magnifying the equities rather than minimizing them.

The Bankruptcy Judge states that the Debtor's plan of arrangement ". . . carries pie-in-the-sky elements" (Opinion at 28). He so characterizes the plan because it supposedly calls for a payout of pre-petition arrears to the Landlords ". . . over many years" (Opinion at 28), a proposal which he describes as clearly unacceptable to them.

In the first place, he misreads the plan. It calls for payment to the Landlords of the arrears "upon confirmation", not over many years. Second, he compounds this error and

confuses the issues by concluding that no Landlords, obviously unwilling to vote for what he thought was a niggardly plan, will renegotiate a terminated lease with the Debtors (Opinion at 28-29). Thus, he overlooks the obvious fact that the leases at issue will be terminated only if the Bankruptcy Court determines they are terminated. Put another way, he cannot argue that termination of the leases is justifiable because the plan is unfeasible, when the plan becomes unfeasible only if the leases are terminated. Thus, the plan of arrangement does not have "pie-in-the-sky elements" since it is palatable, calls for full payment of arrears to Landlords upon confirmation, and is feasible if the Bankruptcy Judge does not allow termination. In short, there can be no plan without assets, there can be no assets without leases and there can be no leases unless forfeiture is prevented.

The Bankruptcy Judge notes that in these proceedings "The landlords' assaults have continued unabated without the kind of forebearing action taken by the Queens Boulevard landlord" (Opinion at 28). It is incredible that the Landlords' "demand for blood", so vigorously rejected in Weaver, supra, should now be rewarded. Further, the Court of Appeals indicated that the landlord's "forbearance" in Queens Boulevard went to the question of estoppel - an issue not considered by it.

Finally, the Bankruptcy Judge notes that rent arrears in Queens Boulevard were just for one month and that the landlord had refused a tender of such arrearage (Opinion at 26). In the instant case, the Bankruptcy Judge contends that the arrears are "staggering" and that ". . . there has been no tender, nor could there be in the light of the aggregate of the pre-petition debt due their landlord" (Opinion at 27).

The extent of this erroneous distinction is demonstrated by the computation in Exhibit "A" annexed hereto. When viewed on a building by building basis, within the context of the net annual profits generated by each warehouse, the arrears are modest. (In one proceeding there were no arrears at all, in another the arrears were one month and in still another only one-half of one month (See Point II, infra, at 37-8.)) Nor are the aggregate arrearages of the Debtors involved in these proceedings even remotely close to the $12,000,000.00 erroneously alluded to by the Bankruptcy Judge (Opinion at 9).

The question of arrears is admittedly an important one - an importance underscored by the Bankruptcy Judge's

decision in Tampa No. 3 where he found for the Debtor because of the absence of such arrears. The Receiver addresses himself to this vital issue in Point II below.

* * *

There are three general areas, then, where the Bankruptcy Judge made crucial mistakes that led to his erroneous conclusion that Queens Boulevard is distinguishable from the cases at bar. He misread the public interest factor; he confused the arrears factor, and, for all intents and purposes, he ignored the windfall factor. With respect to windfall in particular, it should be noted that in Queens Boulevard there was just a mild benefit to the Landlord in the event of forfeiture, that is, a slight increase in rent. In contrast, in the present proceedings, as in the Fleetwood and Weaver cases, supra, the benefit to the Landlords is a massive windfall because they arrogate unto themselves the very assets and business of the Debtors to the detriment of other creditors.

On the basis of all these errors, which include mistakes relating to the very criteria essential to proper judgment, the decision of the Bankruptcy Judge should be reversed.

POINT II

SINCE THE BANKRUPTCY JUDGE HIMSELF HELD THAT BREACH OF THE BANKRUPTCY DEFAULT PROVISION ALONE DOES NOT JUSTIFY FORFEITURE, THE EXISTENCE OF CURABLE RENTAL ARREARS SHOULD NOT JUSTIFY FORFEITURE

The Tampa Decision

At the June 12, 1974 trial of the adversary proceedings with respect to the Tampa No. 3 warehouse, it was established that there was no default under the lease with respect to rent and taxes payable in the pre-petition period. Conceding that the basic rent had been paid, the Landlord nevertheless sought to prove a default by reason of the non-payment by the Debtor of 1973 real estate taxes. However, such taxes were not due and payable until April, 1974 - a date subsequent to the filing of the petition on November 16, 1973.

The Bankruptcy Judge properly refused to consider the non-payment of 1973 taxes as a default because they were neither due and payable at the time of the filing of the petition (and hence not in default at that time), nor could they properly be paid, as a pre-petition debt, after the arrangement proceedings were commenced. This is so because under the Bankruptcy Act all creditors of the same class must be treated equally with respect to the payment of pre-petition debts (See Sections 337(2) and 367(3) of the Bank-

ruptcy Act, 11 U.S.C. §737(2) and 11 U.S.C. §767(3), with respect to distributions to creditors in a Chapter XI proceeding). The payment of pre-petition debt, except as part of a plan involving payment to all creditors, is prohibited as a dividend. 8 Collier on Bankruptcy, (14th ed.) Sect. 1.09 (4). Such payment would also apparently violate the orders of the Bankruptcy Judge*. The Landlord's allegation that late use and occupation payments by the Receiver constituted a default was also dismissed by the Bankruptcy Judge.

The sole remaining default then was the violation of the bankruptcy default clause in the Tampa No. 3 lease by reason of the filing by the Florida Debtor of a petition for arrangement under the Bankruptcy Act.

The Bankruptcy Judge, relying on Queens Boulevard, supra, invoked his equity powers to prevent a forfeiture of the lease and a windfall to the Landlord. (See transcript of the Tampa No. 3 trial dated June 12, 1974, at 47-52, hereinafter "Tampa 3 at ____".) A copy of Judge Babitt's decision in Tampa 3 is annexed hereto as Exhibit B.

The Bankruptcy Judge states:

(i) "I also note for the record that . . . it would appear that this is a property which yields a reasonable profit to the debtor . . ." Tampa 3 at 48.

* Orders for Continuation of Business signed by the Bankruptcy Judge on November 16, 1973 allow only the payment of employees wages for one week in the pre-petition period. Orders authorizing the Receiver to operate the business of the Debtors signed by the Bankruptcy Judge on December 6, 1973 authorize the payment by the Receiver of charges incurred since the filing of the petitions.

The same finding was made with respect to the proceedings at bar.

(ii) ". . . in the judgment of both the debtor and the receiver, that property might well be instrumental in the debtor's continued viability and its ability to come to a successful accord with its creditors by filing a plan and having the wherewithal to translate that plan into the order of confirmation which terminates these proceedings in Chapter XI and which sends the debtor forth rehabilitated. . . ." Tampa 3 at 48.

The same is true with respect to the proceedings at bar.

(iii) "I am not prepared to restore property to a landlord on those facts where the essence of such grant would be to give the landlord a windfall by him realizing the profits which the debtor has from the sub-tenants, . . .

"I rely for that proposition and that proposition alone on the decision by District Judge Judd in the Eastern District of New York in the Queens Boulevard Liquor case which I understand was argued to the Court of Appeals for the Second Circuit, and I also understand was affirmed". Tampa 3 at 49.

The foregoing is equally applicable to the proceedings at bar.

(iv) "But, at present, I rely on the decision of Judge Judd because there was a default of at least a month and an immediate tender. Here I find no default and I think it would be unconscionable for this Court in the exercise of its Chapter XI jurisdiction and the exercise of its equitable function, as recently reaffirmed by the Supreme Court in Bank of Marin against England, that basically we exercise equitable principles in the course of our jurisdiction, and it would seem to me to be incomprehensible that Congress could

> have intended that the entire rehabilitative scheme of Chapter XI would be defeated by restoring property to a landlord where there has been no default and giving the landlord the benefit of all of the profits that the subleases yield to the debtor, and which the debtor needs in the exercise of its business, and in the expectation that profitable ventures such as this will play a part in an order confirming the plan. And, on the very limited and narrow facts presented in this dispute, I once more want to state I make no finding that the lease has been terminated on the bankruptcy petition. I make no finding that anything has affected the lease.
>
> "I simply follow the route suggested by the last affirmative defense suggested in the answer, namely this is a Court of Equity attesting within Congress' scheme to rehabilitate a debtor . . . ." Tampa 3 at 49-50.

Thus, even the Bankruptcy Judge has acknowledged, rather vigorously, that the filing of a petition for arrangement without other events of default, does not justify termination of a valuable leasehold where such forfeiture would impede rehabilitation, deprive the Debtors of an asset instrumental to its continued viability, and confer a windfall. The fact that there are arrears, and manageable ones at that, should not have altered his thinking if the arrears are paid.

Rent Defaults In The Proceedings At Bar

The Bankruptcy Judge places heavy emphasis on the existence of allegedly "staggering" rent arrears as distinguishing these cases from Queens Boulevard where only a single

months rent was involved and a tender of same was made and refused. Absent such arrears the Bankruptcy Judge has ruled against the Landlord of Tampa No. 3 and presumably would have ruled against the Landlords herein.

The question presented is thus whether the Bankruptcy Judge's emphasis on the existence of such arrears is proper. For the reasons set forth below it is submitted that the Bankruptcy Judge erred on this score:

1. The Debtors' proposed plan of arrangement provides for the payment in full of all pre-petition rent arrears to the Landlords at or before confirmation.

2. The Receiver and Debtors have made it clear throughout these proceedings that all pre-petition arrears will be paid. However, they cannot tender or pay pre-petition arrears except as part of the plan of arrangement. To do otherwise, as previously noted, would violate the Bankruptcy Act and the orders of the Bankruptcy Judge.

3. During the trials the Landlords generally testified that if arrears were tendered the Landlords would reject them preferring instead to press their actions for termination. Tender would thus have been futile.

For example, in the Richmond No. 1 trial, the following exchange occurred:

> "Q: If the receiver was now to tender to you the one month and several days in the August period that was delinquent would you accept that?"

"A: No."
(Richmond No. 1, April 18, 1974, transcript at 22.)

Similarly, in the Denver No. 4 trial:

"THE REFEREE: . . . If all monies were to be tendered to you today, would you be content to continue the lease with Overmyer?"

"THE WITNESS: No, sir, Your Honor."
(Denver No. 4, January 23, 1974, transcript at 47.)

Similarly, in the Edison No. 24 trial.

"Q: If Overmyer were willing to cure all defaults at this time in response for your waiving any claims that the lease was terminated, would you accept this offer?"

"A: No."

"Q: Why not?"

"A: Because I don't feel (A) that I want Overmyer as a tenant. I feel Overmyer gave us --"

"THE REFEREE: Never mind, give me (B). (B) is you would like to get that extra sixty thousand dollars?"

"THE WITNESS: Exactly."
(Edison No. 24, January 23, 1974, transcript at 49.)

The foregoing reference to $60,000 that the Landlord "would like to get" refers to the annual profit being earned by the Debtor from the single warehouse in question, i.e., the windfall.

4. Landlords generally conceded that the Debtors were late in their rent payments and that in the pre-petition period such late payments were willingly accepted. It was only after the Debtors were in Bankruptcy that many Landlords attempted to treat such arrears as a default under the lease.

The following exchange in the Columbus No. 3 trial is illustrative:

> "Q: After the lease commenced, did you receive your monthly rent payments promptly?"
>
> "A: No."
>
> "Q: Were they usually late?"
>
> "A: Yes."
>
> "Q: Were they usually late from the very beginning of the lease, from 1968?"
>
> "A: From the early months, yes."
>
> * * *
>
> "Q: Did you ever declare a default?"
>
> "A: We did much later but not at that time."
>
> "Q: I am not talking about the default in connection with this case. Prior to this case, did you ever declare a default by reason of late payments?"
>
> "A: No."
>
> (Columbus No. 3, February 21, 1974 transcript at 11-12.)

5. In several proceedings rent defaults were non-existent or inconsequential at the time the petitions

for arrangement were filed. For instance,

-- In the Minneapolis No. 4 proceeding the Landlord conceded there were no pre-petition defaults with respect to basic rent and that termination of the lease was sought solely on the basis of the bankruptcy clause.

-- In the Jacksonville No. 3 proceeding, the Debtor, pursuant to a stipulation with the Landlord, paid $40,000.00 into a Florida court in October 1973 to cure all unpaid rent and taxes through October 31, 1973. The only pre-petition rent due at the time of the filing of the petition was approximately $3,000.00 representing one-half of November rent.*

One-half of one month's rent of $3,000.00 is insignificant and the Bankruptcy Judge acknowledged as much.

> "THE REFEREE: You may not have a termination here, Mr. Toder."
>
> * * *
>
> "THE REFEREE: You may not find a forfeiture if Judge Judd is right."
>
> (Jacksonville No. 3, March 26, 1974 transcript at 9-10.)

---

* The landlord of Jacksonville No. 3 also sought to treat unpaid 1973 taxes as a default although such taxes did not become due and payable until April 30, 1974. This was exactly the same situation which existed in Tampa No. 3 where the Bankruptcy Judge held that under such circumstances the 1973 taxes could not be considered as part of pre-petition arrears for purposes of determining whether a default existed. See Point II, supra, at 30-31.

The Bankruptcy Judge was aware that Judge Judd had been affirmed by the Second Circuit in Queens Boulevard, supra, but in the complexity of these numerous and protracted litigations apparently overlooked the distinguishing facts of the Jacksonville No. 3 proceeding.

-- In the Richmond No. 1 proceeding the Landlord alleged a rent default of a single month as constituting grounds for termination though prior to that time rent was generally paid, and accepted, several months late.

6. Finally, the Bankruptcy Judge fails to consider the rent defaults for each property on a building-by-building basis preferring instead to speak generally of "staggering" amounts. Yet, without such consideration perspective is lost and objectivity impossible. The three properties discussed immediately above involving little or no pre-petition defaults establish this point.

Even where the arrears are greater, their legal significance can only be measured within the context of each particular case. For example, in the Buffalo No. 2 proceeding, pre-petition rent defaults total $14,187.00. However, the Debtor earns an annual net profit of $43,888.00 from this property under a lease with a remaining life of 33 years.

(See Exhibit A annexed hereto.) The projected profit to the Debtor over the life of the lease exceeds $1,000,000.00; arrears of $14,187.00 can hardly be deemed "staggering" when measured against such a yardstick.

* * *

In summary, the rent arrears are modest when viewed within the context of the profitability of each warehouse. Irrespective of the amount, the Receiver and Debtors have acknowledged that they must be paid. The Debtors' proposed plan of arrangement provides for such payment at or prior to confirmation and the Bankruptcy Judge could have structured an order requiring such payment as a condition to the continuance of the leases.

The fact that a tender of immediate payment has not been made is not significant inasmuch as payment is prohibited at this time except as part of a plan of arrangement. In any event, the Landlords have generally indicated they will reject such a tender while there still exists a possibility of termination.

The mere existence of some arrears is not sufficient reason to deny equitable relief to the Debtors on the primary question of whether the bankruptcy default clauses should be enforced. Arrears exist in every insolvency. Arrears were present in Queens Boulevard, Weaver and Fleetwood, where notwithstanding their existence, the courts

prevented forfeiture.

The reliance by the Bankruptcy Judge on the existence of arrears as dispositive of the issue of whether or not equitable relief will be granted, is thus misplaced. The Bankruptcy Judge's decision in Tampa No. 3 is eminently correct, not because there were no rent defaults in that case, but rather because of the Bankruptcy Judge's proper and judicious use of his equitable power to prevent destruction of the business of the Debtor, a windfall to the landlord and prejudice to all other unsecured creditors.

The factual findings of the Bankruptcy Judge in Tampa No. 3 with respect to the profitability, forfeiture, rehabilitation and windfall, and his legal conclusion that with such factors, termination of the lease must be prevented, apply with equal and compelling force to the cases at bar.

POINT III

SIX PROCEEDINGS IN WHICH LANDLORD-APPELLEES DID NOT RELY ON THE BANKRUPTCY DEFAULT CLAUSES IN THE LEASES ARE NOT ENCOMPASSED WITHIN THE OPINION

In six of the adversary proceedings, involving the warehouses known as Denver No. 4, Camden No. 2, St. Louis No. 2 and 3, Richmond No. 1, Miami No. 3 and Columbus No. 3, the Landlords did not rely on the bankruptcy forfeiture clauses in their respective leases in seeking termination.

The Bankruptcy Judge's Opinion, based on the application and enforceability of such standard bankruptcy default clause, nevertheless purports to include these six cases within its sweeping orbit without any recognition that the factual and legal questions in these six proceedings are totally different and distinct from all of the other cases at bar.

Denver No. 4

The Colorado Debtor earns a net profit of $23,200.00 per year under its long-term net lease for the Denver No. 4 property. The remaining term of the lease with renewal periods, is approximately 33 years.

By notice dated August 14, 1973, Landlord purported to terminate the lease by reason of the default in the payment of rent and mortgage payments aggregating $16,100.00 through August 31, 1973. Additional monies due for the

period September 1, 1973 to November 16, 1973, increase total arrears to $28,300.00 - or less than one year's net profit earned by the Debtor under the lease.

The Landlord of Denver No. 4 seeks termination solely on the basis of the $16,100 default existing in August 1973, although at the trial the Landlord testified that if the total arrears (which exceed $16,100) were tendered, it would be refused.

> "THE REFEREE: . . . If all monies were to be tendered to you today, would you be content to continue the lease with Overmyer?"
>
> "THE WITNESS: No, Sir, Your Honor." (Denver No. 4 trial transcript dated January 23, 1974 at 47.)

In any event, the bankruptcy default provision of the Denver No. 4 lease was not at issue.

Camden No. 2

In this proceeding the Landlord and the New Jersey Debtor entered into a stipulation* on October 29, 1973 incident to a lawsuit in the Superior Court of New Jersey (the "Stipulation"), pursuant to which it was agreed, inter alia, that unless the sum of $137,068.92 was paid by the Debtor to the Landlord by December 31, 1973, the long-term net lease between the Debtor and Landlord would terminate, and conversely, that if said sum was paid by December 31, 1973, the lease would remain in full force and effect.

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* Exhibit "A" to Receiver's Amend ! Answer in Camden No. 2 proceeding.

The Landlord sought to terminate the lease on the sole ground that the Debtor failed to pay the monies due under the Stipulation by December 31, 1973.*

---

* At the trial the Landlord introduced into evidence a judgment of possession in favor of Landlord dated September 21, 1973 and filed October 4, 1973. However, Landlord did not seriously contend in its pleadings or at the trial that the judgment (which antedated the Stipulation) was dispositive. (See transcript of Camden No. 2 trial dated April 11, 1974, hereinafter "Camden No. 2 at _____"). Rather Landlord relies on the Stipulation.

As the Bankruptcy Judge noted:

> " . . . I would assume that having brought these proceedings to recover possession, it seems clear to me that neither this (New Jersey) order or writ were implemented or if they were implemented, they -- maybe they were subsequently changed." (Camden No. 2 at 7.)

In further colloquy, it was stated:

> "MR. ZIMMERMAN (attorney for Landlord): This is an action for possession."
>
> "THE REFEREE: That means the Debtor had possession. You want possession. What is the difference? You altered the Court in New Jersey by, in essence, refusing the implementation of it and giving back the Debtor the premises on conditions." (Camden No. 2 at 8.)

The Stipulation itself recites that if the money judgment is paid then the lease "shall continue in full force and effect" (paragraph 4 of the stipulation). Obviously, a lease which is to "continue" has not been terminated and the landlord's own witness confirmed as much (Camden No. 2 at 16).

The unpaid portion* of the monies due under the Stipulation represent a pre-petition indebtedness. The payment of such indebtedness on December 31, 1973 was prohibited as a dividend under the Bankruptcy Act and, would violate the Bankruptcy Judge's orders (See Point II, supra). Landlord nevertheless argued that failure to pay in full by December 31, 1973 resulted in an automatic termination of the lease.

Inasmuch as compliance with the Stipulation subsequent to the Debtor's filing of a petition for an arrangement on November 16, 1973 would violate an order of the Bankruptcy Court, the Bankruptcy Judge's inherent equitable power to grant relief to avoid forfeiture and a windfall to the Landlord would appear to be greater than where a default was declared under the lease by reason of an event in the pre-petition period. In this regard no default or termination notices were given by landlord under the lease.

> "MR. ZIMMERMAN: Your Honor, I can state for the record that no termination notice was sent during the pendency of these proceedings." (Camden No. 2 at 23.)

The bankruptcy default provision of the Camden No. 2 lease was not at issue.

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* Under the Stipulation Overmyer assigned to the landlord accounts receivable under which the Landlord collected various monies prior to November 16, 1974. The landlord's witness was not certain of the amount of such collection, but "guessed" that same was "in the neighborhood of $5,000.00" (Camden No. 2 at 19).

St. Louis No. 2 and 3

In this proceeding the Landlord purported to terminate the lease effective July 31, 1973 for rent defaults in the pre-petition period. Based on such defaults the Landlord filed a suit for possession of the premises in the Magistrates Court of St. Louis, Missouri, which proceeding was stayed by the Order of the Bankruptcy Judge. (See transcript of St. Louis No. 2 and 3 trial dated April 18, 1974, hereinafter "St. Louis No. 2 and 3 at _____".)

The Landlord does not allege a default under the bankruptcy default provision in the St. Louis No. 2 and 3 lease, contending instead that the lease was terminated prior to bankruptcy and that the only question to be decided by the Bankruptcy Judge is "when does the Landlord obtain possession?"

At the trial it was established that the Debtor paid $17,000.00 directly to the Landlord in the summer of 1973 in partial payment of arrears (St. Louis No. 2 and 3 at 29) and that the Debtor caused $74,186.00 to be paid to the Landlord by a third party towards the payment of a portion of such arrears (St. Louis No. 2 and 3 at 30). With respect to the balance of the arrears the Landlord testified he would not accept same at this time.

> "Q: Mr. Slater, if the receiver were to today tender to you all of the arrears, interest and legal fees in order to cure all pre-petition defaults, would you accept the check?"

"A: No, sir . . ."
(St. Louis No. 2 and 3 at 33.)

The Bankruptcy Judge failed to make any special findings of fact with respect to the St. Louis No. 2 and 3 proceeding nor did he address himself to the legal issues in this case.

In any event, the bankruptcy default provision of the St. Louis No. 2 and 3 lease was not at issue.

Richmond No. 1

In the Richmond No. 1 proceeding the Landlord contends that its long-term net lease with the Virginia Debtor terminated because of the failure of the Debtor to pay a single month's rent. The purported termination took place on August 8, 1973, well before the commencement of bankruptcy proceedings on November 16, 1973.

The Landlord based its termination solely on the one month rent default and the provisions of the lease giving the landlord the right to terminate upon the failure of the tenant to pay rent. (See transcript of Richmond No. 1 trial dated April 18, 1974, hereinafter "Richmond No. 1 at _____".) The Landlord did not commence any legal proceedings in the Virginia Courts, or elsewhere, for a judgment of termination until the matter was before the Bankruptcy Judge.

The Debtor in this proceeding, as in the other proceedings discussed herein, finds itself in the anomolous position of having lost a valuable long-term lease (which for this Debtor constitutes its sole asset) on the basis of an Opinion by the Bankruptcy Judge which relies upon the applicability of a provision of the Lease (the bankruptcy default clause) which was never at issue. The legal issues to be determined in this proceeding were simply never confronted.

Thus, the Landlord of Richmond No. 1 testified at the trial that the Debtor paid its rent late over a period of years preceding the purported termination on August 8, 1973. (Richmond No. 1 at 14-17.) The Landlord acquiesced in this pattern of payment. Certainly, an important legal question arises as to whether the Landlord is now estopped to seek a forfeiture on the basis of the default or late payment of a single month's rent. The extent of the forfeiture and the resulting windfall to the Landlord may be measured against the fact that the Debtor earns a net profit of $40,000.00 per annum under its long-term lease for this property. Finally, the Landlord testified that if the single month rent arrears were tendered at this time he would refuse to accept same (Richmond No. 1 at 22).

In any event the bankruptcy default provision of the Richmond No. 1 lease was not at issue.

Miami No. 3

In this proceeding, the Landlord commenced an action for possession in the Circuit Court of Florida prior to November 16, 1973, based on rent defaults. There has been no final disposition in the Florida action. The Landlord's complaint in the within proceeding alleges that the commencement of the within bankruptcy proceedings constitutes a default under the lease. However, no notice of default under the bankruptcy default provision of the lease was given, notwithstanding the fact that the lease expressly provides that the filing of a petition for arrangement, and the appointment of a receiver, constitute defaults only if the Landlord elects to declare such a default by written notice.

The bankruptcy default provision of the Miami No. 3 lease was not at issue.

Columbus No. 3

In this proceeding the Landlord contends that the lease was terminated on September 30, 1973 by reason of the non-payment of taxes of approximately $4,700.00. No notice of default was given by the Landlord under the bankruptcy default provision of the lease.

Subsequent to the tax default notice, and up to the time of the filing of the petition for arrangement on November

16, 1973, arrears increased to $15,500.00 or approximately one year's net profit earned by the Ohio Debtor under its lease for this property. (See Schedule A.) At the trial, the Landlord testified that even if all arrears were paid he would continue to press for termination (Columbus No. 3 trial transcript at 13-14).

The bankruptcy default provision of the Columbus No. 3 lease was not at issue.

* * *

In conclusion, six of the Debtors' long-term leases have now been terminated pursuant to orders of the Bankruptcy Judge entered on the basis of his Opinion which totally fails to make any findings of fact or conclusions of law which relate to the unique facts of these six cases.

Even absent bankruptcy considerations state courts have granted relief from forfeiture in landlord-tenant controversies, in circumstances comparable to those at bar. Where the dispute arises in a pending Chapter XI bankruptcy proceeding, the need for equitable relief is strengthened by the public interest in the rehabilitation of the debtor and the protection of all creditors, as well as under general equitable principles.

It is respectfully submitted that judicial termination of these leases under bankruptcy default provisions which were not even at issue constitutes reversible error.

POINT IV

THE BANKRUPTCY JUDGE ERRED IN FAILING TO MAKE SPECIAL FINDINGS OF FACT AND HIS CONCLUSION OF LAW IS NOT SUFFICIENTLY SUPPORTED BY HIS GENERALIZED FINDINGS

Pursuant to Rule 752 of the Rules of Bankruptcy Procedure, the court is required to "find the facts specially and state separately its conclusions of law thereon." Rule 752 further provides:

> "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appeared therein."

Rule 752 is an adaptation of Rule 52 of the Federal Rules of Civil Procedure which contains identical language to that quoted above.

The Receiver does not contend that separate formal findings of fact and conclusions of law are required in each proceeding. Clearly, the Bankruptcy Judge may include appropriate special findings and conclusions in his Opinion. The problem, and resulting error, rather arises from the failure of the Bankruptcy Judge to "find the facts specially and state separately its conclusions of law thereon", in his Opinion, with respect to the separate and distinct litigated adversary proceedings at issue.

If this controversy involved a single debtor, the only issues would be whether the Bankruptcy Judge's

findings of fact were clearly erroneous, or whether he erred in his conclusions of law. However, the Receiver appeals from orders in sixteen litigated adversary proceedings involving multiple Debtors who are separate and distinct legal entities.* As has been demonstrated at length at Points II and III, supra, the facts with respect to the various Debtors vary widely.

The Bankruptcy Judge acknowledged the importance of the facts at issue, because he found against the Debtors and Receiver ". . . on the facts herein and in the exercise of his equitable discretion. . ." (Opinion at 30). Yet, no special findings are made with respect to the several separate proceedings which presented different factual situations. The generalized findings of the Bankruptcy Judge do not apply to all of the Debtors (see Points II and III, supra) and findings which should have been made with respect to individual Debtors were not even stated generally.

To the extent that the requisite special findings are lacking the orders appealed from should be vacated and the matters remanded for further appropriate findings. (In re Gentile, 107 F. Supp. 476 (D. Ky 1952); cf. In re Ulrico Development, 311 F.Supp 1393(D.P.R. 1970)).

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* These proceedings have not been consolidated. A motion for that relief by the receiver is pending before the Bankruptcy Judge, but no hearing has yet been held.

The Bankruptcy Judge contends that ". . . the issues raised here are primarily legal ones on the totality of evidence adduced at the trial." (Opinion at 14.) His contention would be correct if he, or this Court, found for the Debtors under the authority of Queens Boulevard, supra, because the factual criteria of Queens Boulevard, i.e., windfall, forfeiture, inability to formulate a plan if the assets are lost, are all present with respect to each of the Debtors and could be found upon review of the record of each proceeding.

However, to sustain his conclusion that ". . . the equitable concerns are not robust enough to turn these landlords away." (Opinion at 29), the Bankruptcy Judge should have made specific findings with respect to each Debtor. His failure to do so deprives the Debtors and Receiver of their opportunity to contest the findings on which such conclusion is based. Moreover, review of the transcripts of the several proceedings establishes that the conclusions of law by the Bankruptcy Judge are not supported by his generalized findings with respect to each Debtor.

For example, with respect to the Jacksonville No. 3 warehouse, it was established that: a) thirty days prior to the filing of the petition, the Florida Debtor, pursuant to a stipulation with the Landlord, deposited

$40,000 into a Florida court to cure all rent and other defaults through October 31, 1973; (b) that the default with respect to pre-petition arrears amounts to only approximately $3,000, representing one-half of one months' rent, and (c) that the lease is profitable.

The Bankruptcy Judge's conclusion that the ". . . equitable concerns are not robust enough" to afford relief to the Debtor and Receiver in the Jacksonville No. 3 adversary proceeding is not supported by the evidence and to deny equity on these facts, particularly in the light of Queens Boulevard, constitutes an abuse of discretion.

It is submitted that the same factual considerations hold true with respect to the other Debtors in those proceedings in which the Receiver is prosecuting his appeal.

Accordingly if and to the extent this Court determines that the Bankruptcy Judge's Opinion should not be reversed as a matter of law, the orders appealed from should be vacated and the various proceedings remanded for the making of appropriate special findings of fact. It is respectfully submitted that if the Bankruptcy Judge were to have made the special findings of fact in the sixteen adversary proceedings in which the Receiver appeals, he would have then and there determined that the particular "equitable concerns" in fact were "robust enough" to afford relief.

CONCLUSION

Before this Court, then, is a classic example of jurisprudence. §70b of the Bankruptcy Act, "which lies at the heart of this case" (Opinion at 18), might have been construed to mandate in all cases an inequitable result, forfeiture of leaseholds. Instead, §70b of the Bankruptcy Act was judicially construed to give a Bankruptcy Court discretion as to whether to allow forfeiture. See Smith, Fleetwood, Weaver and Queens Boulevard, supra. The rationale of this case law dealing with the proper exercise of judicial discretion was so sound that legislation mandating an equitable result is now pending.* The Opinion of a respected Bankruptcy

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* A commission on the Bankruptcy Laws of the United States was established by Public Law 91-354 effective July 24, 1970. The Commission consisted of nine members, (one of whom was the Hon. Edward Weinfeld of this Court). The Commission issued its report and recommendations on July 30, 1973, and based thereon a revised Bankruptcy Act was introduced in the House of Representatives on October 9, 1973 (H.R. 10792) and is now pending before the Committee on the Judiciary.

The proposed legislation would make the boilerplate bankruptcy default provision in leases unenforceable where defaults in prior performance under the lease are cured.

> "§4-601(b) Invalidity of Certain Restrictions and Forfeitures. - Any. . . provision for forfeiture or termination conditioned on the filing of a petition is unenforceable as to property of the estate. . . " H.R. 10792, 1st Sess., 93d Cong. (1973) at 137.
>
> "§4-602(b)2 Unenforceability of Certain Contractual Provisions. - A provision in a contract or lease. . .
>
> (2) is not enforceable in a case under (the equivalent of Chapter XI). . . if . . . within a reasonable time thereafter, any defaults in prior performance of the debtor are cured and. . ." H.R. 10792, 1st Sess., 93d Cong. (1973) at 139."

Judge should not impede this development.

The law in this Circuit as expressed in the Queens Boulevard decision is clearly controlling in the cases at bar. All of the criteria for preventing forfeitures which were enunciated in Queens Boulevard are clearly present and the failure of the Bankruptcy Judge to follow the rationale of Queens Boulevard warrants his reversal by this Court as a matter of law.

Alternatively, the orders appealed from should be vacated and the matters at bar remanded for appropriate special findings of fact, and conclusions of law, with respect to each of the separate adversary proceedings encompassed within the Bankruptcy Judge's single Opinion.

Respectfully submitted,

BOOTH, LIPTON & LIPTON
Attorneys for Robert P. Herzog,
Receiver

Of Counsel: Edgar H. Booth, Esq.
Will B. Sandler, Esq.
Michael R. Kleinerman, Esq.

Re: D. H. OVERMYER CO., INC.

Summary of Contested Warehouse Leases Per Record on Appeal

Property*	Square Feet	Annual Gross Profit	Annual Over-head**	Pre-Petition Lease De-faults***	Annual Net Profit	Balance of Lease Term In-cluding Renewals
Boston 6 & 7	240,000	$113,680	$40,000	$35,552	$78,680	34 years
Buffalo 2	120,000	63,888	20,000	14,187	43,888	33 years
Camden 2	120,000	48,000	15,800	(a)	32,200	38 years
Columbus 3	120,000	35,232	20,000	15,505	15,232	24 years
Denver 1	120,000	35,000	20,000	59,800	15,000	33 years
Denver 4	120,000	43,200	20,000	16,100	23,200	33 years
Detroit 8	120,000	96,000	20,000	95,000	76,000	74 years

Continued. . . .

* The city in which the warehouse is located determines the particular state Debtor. Thus, the Boston 6 & 7 lease is owned by the Massachusetts state Debtor, and so forth.

** At a hearing on April 18, 1974, the average overhead expense was determined by the Bankruptcy Judge to be $20,000 per annum per 120,000 foot warehouse. The Receiver submits that this figure is unrealistically high in determining profitability inasmuch as it includes the non-recurring costs of the administration of the Chapter XI proceedings.

*** The Receiver has scheduled all rent and taxes due up to the filing of the petitions for arrangement on November 16, 1973, as "defaults". However, not all Landlords elected to declare a default under the lease by reason of such arrears, relying instead solely on the bankruptcy default provisions. In some instances the amount is greater than the default scheduled above by reason of pre-petition arrears which accrued subsequent to the filing of the petitions.

NOTES:

(a) No defaults are alleged nor arrears claimed under lease in Camden No. 2. Default is claimed in payment of judgment in favor of landlord, which judgment has unpaid balance of approximately $130,000. See page 42 , supra.

EXHIBIT "A"

Summary of Contested Warehouse Leases Per Record on Appeal

(Continued)

Property*	Square Feet	Annual Gross Profit	Annual Overhead**	Pre-Petition Lease Defaults***	Annual Net Profit	Balance of Lease Term Including Renewals
Edison 24	80,000	$ 86,916	$13,333	$16,800	$73,583	35 years
Jacksonville 3	80,000	18,000	13,333	3,000(c)	4,667	34 years
Miami 2	120,000	88,356	20,000	8,900	68,356	33 years
Miami 3	120,000	73,800	20,000	59,860	53,800	33 years
Miami 7-9	120,000	8,556	16,666	33,306	(8,110) (e)	38 years
Minneapolis 4	120,000	51,600	20,000	(d)	31,600	35 years
Richmond 1	160,000	66,000	26,000	10,800	40,000	14 years
St. Louis 2 & 3	160,000	(b)	(b)	(b)	(b)	58 years
San Francisco 3	120,000	23,136	20,000	49,170	3,136	23 years

TOTAL ANNUAL NET PROFIT $551,232

(b) The extent of the arrears, overhead and net profit with respect to St. Louis No. 2 & 3 are not clear from the record. Overhead and net profits are affected by the fact that the sub-tenant of the Debtor makes all repairs and pays all insurance. Substantial payments were made on account of pre-petition arrears but the balance of the arrears is not clear from the record.

(c) Pre-petition rent arrears for Jacksonville No. 3 are approximately $3,000. In addition, approximately $12,000 for 1973 taxes became payable in 1974, after the filing of the petition. The 1973 taxes are not a lease default. See page 37, supra.

(d) The landlord of Minneapolis No. 4 claims that interest and legal fees aggregating approximately $8,000 are due from the Debtor. No pre-petition rent arrears are alleged. See page 37, supra.

(e) The profitability of the Miami No. 7-9 warehouse does not appear from the record.

THE ORAL OPINION OF THE BANK-
RUPTCY JUDGE RENDERED IN THE
TAMPA NO. 3 PROCEEDING

EXHIBIT "B"

been premises restored to the owners because it was concluded by the receiver and debtor these were not viable enterprises which would conceivably play a part in the rehabilitation of the debtor assuming, of course, it is able to be rehabilitated within the context and scheme of the Chapter XI arrangement proceedings under which it finds itself.

The motion is in all respects at this point denied. The reasons for the denial are as follows:

Number one, it is an inherent power of this Court to keep a debtor in possession of its property, at least until it's able to come to an accord with its creditors, whether in a plan or otherwise, and there is no doubt of that power, and I rely primarily at this juncture on in re: Lane Foods, a decision of Judge Weinfold of this Court. I adopt all of that decision for the purpose of this controversy save for what might be implicit in Judge Weinfold's language that the stay might at some point be terminated or that the debtor could re-negotiate a lease, a new lease, with

the landlord. I do not adopt that and do not find that the lease has in any respect been terminated.

I also note for the record that even casting the facts most favorably in favor of the landlord, 72 Barrow Street Realty Corporation, that on those facts casting them in their favor it would appear that this is a property which yields a reasonable profit to the debtor, and in the judgment of both the debtor and the receiver, that property might well be instrumental in the debtor's continued viability and its ability to come to a successful accord with its creditors by filing a plan and having the wherewithal to translate that plan into the order of confirmation which terminates these proceedings in Chapter XI and which sends the debtor forth rehabilitated.

I am not at this point prepared in the face of what appears to be no pre-petition default - - although technically there is a default in that the 1973 taxes were due but were not payable until after the proceedings were begun and after the receiver took over - -

I am not prepared to restore property to a landlord on those facts where the essence of such grant would be to give the landlord a windfall by him realizing the profits which the debtor has from the sub-tenants, in keeping with the subleases, and I put aside for the moment the question of whether or not the lease with West Cash & Carry will be or will not be rejected under the authority of Section 313(1) of the Bankruptcy Act wherein that individual or the company, if it wishes to stay in the premises, might have to negotiate a lease more in keeping with the going rate, as has been testified to by Mr. Flanagan.

I rely for that proposition and that proposition alone on the decision by District Judge Judd in the Eastern District of New York in the Queens Boulevard Liquor case which I understand was argued to the Court of Appeals for the Second Circuit, and I also understand was affirmed. But, at present, I rely on the decision of Judge Judd because there there was a default of at least a month and an immediate tender. Here I find no default and I think

it would be unconscionable for this Court in the exercise of its Chapter XI jurisdiction and the exercise of its equitable function, as recently reaffirmed by the Supreme Court in Bank of Marin against England, that basically we exercise equitable principles in the course of our jurisdiction, and it would seem to me to be imcomprehensible that Congress could have intended that the entire rehabilitative scheme of Chapter XI would be defeated by restoring property to a landlord where there has been no default and giving the landlord the benefit of all of the profits that the subleases yield to the debtor, and which the debtor needs in the exercise of its business, and in the expectation that profitable ventures such as this will play a part in an order confirming the plan. And, on the very limited and narrow facts presented in this dispute, I once more want to state I make no finding that the lease has been terminated by the bankruptcy petition. I make no finding that anything has affected the lease.

I simply follow the route suggested

by the last affirmative defense suggested in the answer, namely, this is a Court of Equity attesting within Congress' scheme to rehabilitate a debtor. I do not believe this landlord has been impeded, a word used by District Judge Brient in a decision affirming this Court's decision in the matter of Unishops, Inc., later affirmed on other grounds by the Court of Appeals for the Second Circuit in March of this year.

There Judge Brient opined the fact that firm clauses such as these should not be enforceable, particularly where the landlord has not, to use his words, been impeded.

I think the Court is bound by the decision in Finn against Meehan - - I think it's 325 U. S. or 300 U. S., it doesn't matter because we will get you the right citation. There the Supreme Court concluded that clauses such as these are, indeed, enforceable. Judge Judd agreed with that and, nonetheless, found in the exercise of an equitable jurisdiction there could be appropriate circumstances in which the Courts wouldn't enforce the termina-

tion of the debtor's estate in the property to return the property to a landlord for the purpose of that landlord achieving a substantial profit.

The Court goes no further than that and cites all parties concerned to the decision by the Third and Fourth Circuits referred to by Judge Judd in his decision in Queens Boulevard and, also, the remarks of Supreme Court Justice White, dissenting from the denial of certiorary in one of these and wondering about the continued vitality of Finn against Meehan.

The motion is in all respects denied. It is so ordered. For purposes of an appeal under Part 8 of the bankruptcy rules, Mr. Zimmerman, you may consider your time under Section 39C of the Bankruptcy Act to be running from now. I will merely make a memorandum endorsement on the papers that the motion is denied for the reasons set forth on the record. So ordered.

MR. ZIMMERMAN: May I request certain clarifications of your decision at this point?

THE REFEREE: Yes.

MR. ZIMMERMAN: Is it Your Honor's decision that he is not making any determination of the issue as to whether or not the lease is terminated on the basis of the default provision in the lease, but is only determining that the landlord's request for possession of the premises is denied on the basis of Lane Foods?

THE REFEREE: That is basically what I have done.

MR. ZIMMERMAN: Then, Your Honor, there is no finding of fact that there has not been a default under the lease.

THE REFEREE: I made no finding with respect to the lease. I stated in the record what I consider the facts to be. I do not and I don't think anyone should conclude these add up to a default as a matter of law. I do no more than express what the evidence showed as to defaults as of the time of the petition. I don't use the word "default" legally.

If you wish to appeal, Mr. Zimmerman, you may follow the procedure now set forth by

Part 8 of the bankruptcy rules. Your time begins from today under Section 39C.

MR. ZIMMERMAN: May I, in the presence of the Court, ask how soon I can have the transcript?

MR. RAYVID: Monday.

MR. ZIMMERMAN: May I ask that the applicant be given an additional twenty days to perfect his appeal?

THE REFEREE: I think I should have that in writing. I think the new rules contemplate an order. I feel much tidier working with an order, particularly since the Saint Regis paper in the Fifth Circuit. I think the outside reach I can give you is up to thirty days.

MR. ZIMMERMAN: Up to thirty?

THE REFEREE: I will give you the maximum authorized by Rule 801.

MR. BOOTH: The receiver will consent.

THE REFEREE: That's nice of you, Mr. Booth, since I was going to do it anyway. Mr. Zimmerman, thank you, and Mr. Fixell, thank you.

MR. ZIMMERMAN: Would you like the exhibits?

THE REFEREE: I think if you are going to appeal, each party should be responsible for his own exhibits. Thank you, gentlemen.

- - - - -

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal brief~~ appendix on Wachtell, Lipton Rosen & Katz, the attorneys for the ~~respondent~~ appellees by leaving ~~mailing~~ two ~~three~~ copies thereof at his office located at 299 Park Avenue New York, N.Y. Landlords of Boston 6 & 7 - Miami 2

Bert Myers

Sworn to before me this 1st day of November 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

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COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal brief~~ appendix on Hahn, Hessen Margolis & Ryan, the attorneys for the ~~respondent~~ appellees by leaving ~~mailing~~ two ~~three~~ copies thereof at his office located at 350 Fifth Avenue New York, N.Y. Landlords of Buffalo 2, Columbus 3, Denver 4 & Miami 7

Bert Myers

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Theresa Corless

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Notary Public, State of New York
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Qualified in Bronx County
Term Expires March 30, 1976

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COUNTY OF NEW YORK

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Bert Myers

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Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal brief~~ appendix on Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll the attorneys for the ~~respondent~~ appellees Landlords of Minneapolis 4 by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 919 Third Avenue New York, N.Y.

Bert Myers

Sworn to before me
this 1st day of
November 1974
Theresa Corless
THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal brief~~ appendix on McManus & Ernst the attorneys for the ~~respondent~~ appellees Landlords of Miami 3 by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 295 Madison Avenue New York, N.Y.

Willard Valade

Sworn to before me
this 1st day of
November 1974
Theresa Corless
THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal brief~~ appendix on Reavis & McGrath the attorneys for the ~~respondent~~ appellees Landlords of Detroit 8 by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at One Chase Manhattan Plaza New York, N.Y.

Willard Valade

Sworn to before me
this 1st day of
November 1974
Theresa Corless
THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal brief~~ appendix on Zalkin Rader & Goodman the attorneys for the ~~respondent~~ appellant by leaving ~~mailing~~ two ~~three~~ copies thereof at his office located at 750 Third Avenue New York, N.Y. Landlords of Jacksonville 3

Bert Myers

Sworn to before me this 1st day of November 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518017
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal brief~~ appendix on Baker Hostetler & Patterson the attorneys for the ~~respondent~~ appellant by ~~leaving~~ mailing two ~~three~~ copies thereof at his office located at Union Commerce Building Cleveland, Ohio 44115 Landlords of Denver 1

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Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518017
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal brief~~ appendix on Henry & Brecker the attorneys for the ~~respondent~~ appellant by leaving ~~mailing~~ two ~~three~~ copies thereof at his office located at 40 Exchange Place New York, N.Y. Landlords of Edison 24

Willard Valade

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Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518017
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal brief~~ appendix on Abberley Kooyman, Marcellino, Clay & Co. the attorneys for the ~~respondent~~ appellees Landlords of Richmond I by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 521 Fifth Avenue New York, N.Y.

Willard Valade

Sworn to before me
this 1st day of
November, 1974
Theresa Corless
THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal brief~~ appendix on Weinstein, Skoller & Kay P.C. Landlords of St. Louis 2-3 by leaving ~~mailing~~ two copies thereof at his office located at 118-21 Queens Boulevard Forest Hills, N.Y. 11375

Willard Valade

Sworn to before me
this 1st day of
November 1974
Theresa Corless
THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal brief~~ appendix on Levy, Levy & Ruback the attorneys for the Debtors-appellants ~~respondent~~ by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 225 Broadway New York, N.Y.

Willard Valade

Sworn to before me
this 1st day of
November, 1974
Theresa Corless
THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976